IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

## No. 357

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, INDEPENDENT EXECUTOR OF THE ESTATE OF W. G. HIGGINS, DECEASED, PETITIONER,

versus

FRANK SCOFIELD, COLLECTOR OF INTERNAL REVENUE, RESPONDENT.

## PETITIONER'S REPLY TO OPPOSITION BRIEF.

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LODOVIC PRINTING CO., SAN ANTONIO, TEXAS

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To the Honorable Supreme Court of the United States:

It is believed that respondent's brief obscures, rather than clarifies, the matters at issue.

### THIS CASE COMPARED TO MERCHANTS BANK AND ITHACA CASES.

This Court is assured by respondent that the provisions of the will, which are quoted on page 4 of his brief,

furnish "no reliable criteria for ascertaining the value of the charitable bequests." Yet, "*the necessities and comforts in life to which she (the widow) is accustomed*" are found by the trial court to cost $320.00 per month; the trustee, in whom everything was vested by the will, had the exclusive right to invade the principal and is permitted by its terms only to "use such *reasonable* sums" therefrom as it "may deem *necessary*" to maintain her in that manner, either in the "home or location of her choosing;" and it appears that she died within less than six months after her husband died, virtually without ever leaving the home at all. Applying these "reliable criteria," the value of the charitable bequests are mathematically ascertainable at the time of decedent's death by applying the life expectancy of the failing widow to the undisputed cost of her maintenance.

This Court is further assured by respondent that the facts are essentially the same as in *Merchants Bank v. Commissioner*, 320 U. S. 256, and that the decision below is "in complete accord with this Court's holding in that case." In our opinion, neither of these things is true. In the first place, "*the necessities and comforts in life to which she is accustomed*" is not a matter of speculation, like the element of "happiness" of the widow in the will in the *Merchants Bank case*, but rather is essentially the same as the standard that was held in *Ithaca Trust Co. v. United States*, 279 U. S. 151, to be "fixed in fact and capable of being stated in definite terms of money," the standard there involved being such "comfort as she now enjoys."

Furthermore, the command here to "liberally provide" for the widow is the least that could be expected as between husband and wife, and since such provision and her maintenance in a home of her own choice are restricted by the right to invade the principal only for "such *reasonable* sums" as

the trustee "may deem *necessary*" to provide the widow with her accustomed necessities and comforts, the situation is entirely different from that presented by the will in the Merchants Bank case, which commands the trustee *"to exercise its discretion" with liberality* in invading the principal.

In the second place, the opinion in the *Merchants Bank case*, as we read it, fully recognizes all of these distinctions and, in effect, reaffirms the decision in the *Ithaca Trust Company case*, and since this case and the *Ithaca Trust Company* case are essentially alike on their facts, the decision below is not in accord with this Court's holding in the *Merchants Bank case*.

## OTHER CASES CITED BY RESPONDENT DISTINGUISHED.

The will in *Industrial Trust Co. v. Commissioner*, 151 F. (2) 592 (CCA 1st — cer. den. in 327 U.S. 788), authorizes an invasion of the principal for the "comfort and *pleasure*" of the widow, and the court correctly held that the term "pleasure" was "at least no narrower than the term 'happiness'," as used in the *Merchants Bank case*.

It is to be noted that actually the same thing is true about *Union Planters National Bank v. Henslee*, 166 F. (2) 993 (CCA 6th), in which a writ of certiorari was granted by this Court on October 11, 1948. There also the will authorized an invasion of the principal "for the *pleasure*, comfort and welfare of my mother."

In *Newton Trust Co. v. Comissioner*, 150 F. (2) 175 (CCA 1st), it was held that "it is impossible to predetermine just how much would be expended for 'use and benefit' or even to set up a dollars and cents maximum." This is certainly not true in our case, for the undisputed evidence

is that what was required to provide the widow with her accustomed necessities and comforts was predetermined by the decedent's budget as being $320.00 per month.

In *De Castro's Estate v. Commissioner*, 155 F. (2) 254 (CCA 2nd — cer. den.), the will authorizes the trustee to invade the principal for such amounts as "will amply provide for her (the wife's) needs" in the event of "illness, accident or other unforeseen emergency," and there was held to be no way of determining the probability of invasion nor was there a "standard of measure of the amounts that might be withdrawn," as in the *Ithaca Trust Co. case.*

It is interesting to note the close approximation of the language used in the will in the *Newton Trust Co. case* with that used in the will in *Commissioner v. Robertson*, 141 F. (2) 855 (CCA 4th), and in the *De Castro case* with that used in *Commissioner v. Wells Fargo Bank & Union Trust Co.*, 145 F. (2) 130 (CCA 9th), and to further note that in the later case from the Second Circuit the former case from the Ninth Circuit is not mentioned. Perhaps this is accounted for by the query put in the memorandum opinion of the Circiut Court in the *De Castro case* as to whether this Court, in the *Merchants case*, "so narrowed * * * (the) scope (of the *Ithaca case*) as virtually to overrule it sub silentio."

This query was not answered by this Court's denial of certiorari, for, as noted by the Circuit Court of Appeals, the decision in that case was not out of harmony with the *Ithaca case*

## THE GRANTING OF CERTIORARI IN NO. 90, HENSLEE v. UNION PLANTERS NATIONAL BANK & TRUST CO.

Respondent says that that case "called for further review because, as alleged in the government's petition for certiorari, if the decision in the Circuit Court of Appeals were permitted to stand, it would seriously undermine this Court's ruling in the *Merchants Bank case.*"

With this we agree, but we say that if the decision of the Circuit Court of Appeals is permitted to stand in our case, it will seriously undermine this Court's ruling in the *Ithaca Trust Co. case*, throw doubt upon whether this Court in the *Merchants Bank case* intended to so narrow the scope of the *Ithaca Trust Co. case* as in effect to overrule it, and, most important of all, keep the subordinate courts, the tax authorities, and the taxpayers in the dark on the true rule to be applied on an important and oft-recurring question of federal estate tax law.

Therefore, we urge that certiorari should be granted in this case, and the case perhaps consolidated, for purposes of convenience, with the Henslee case.

## THE OMISSIONS OF THE OPPOSING BRIEF.

The government's brief leaves unanswered so much of importance in petitioner's brief as to amount to a virtual confession of several crucial propositions advanced by us.

In the first place, there can be no doubt whatever but that the real basis of the adverse decision and holding of the Circuit Court of Appeals is to be found in the final paragraph of the opinion, which says that *"the issue is one of fact* on which the lower court found against the taxpayer on evidence that supports its finding."

This is an utterly erroneous assumption on the part of the court, as the petitioner believes it has clearly shown

in its previous brief, pages 24-26. Whether a standard was fixed in the terms of this will is a clear-cut question of law, and it has no disputable fact involvement whatever.

Again, the right of the widow, under this will, to make a choice of a home apparently weighs heavily with the Circuit Court of Appeals, although the invasion of the principal is committed entirely to the discretion of the trustee, not the widow, and it is authorized only to use "such *reasonable* sums" as deemed "*necessary*" to maintain her in her accustomed manner of life, as shown in detail on pages 26 to 31 of petitioner's brief.

Again, as shown on pages 33 to 35 of petitioner's brief, the testamentary intent here negatives any invasion of the principal as long as the use of the widow's one-half of the community estate rendered the invasion of the principal avoidable.

Finally, as shown on pages 35 to 37 of petitioner's brief and so forcefully driven home in the able dissenting opinion of Judge Hutcheson, there was here no real probability of invasion of the principal, so that all of it will go intact to charity.

The obvious reason why respondent's brief does not undertake to justify the opinion of the court below is because it cannot do so. If an invasion of the principal was considered probable, respondent would have undertaken to so show.

## CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and there-

after reviewing and reversing the judgment of the Circuit Court of Appeals herein.

Respectfully submitted,

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November ....., 1948.